Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

NORMAN BAKER, PETITIONER AND APPELLANT,

VS.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT AND APPELLEE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(A) OPINION OF LOWER COURT.

The District Court rendered no opinion, but its Findings of Fact and Conclusions of Law appear in the record, page 81. The opinion of the Circuit Court of Appeals is in 129 F. 2d 779.

(B) GROUNDS OF JURISDICTION.

This case is an application for writ of habeas corpus to test the validity of the sentence and commitment under which Petitioner is restrained by the Respondent and is a civil case in the Circuit Court of Appeals within the meaning of Sec. 347 (a) of Tit. 28, F. C. A., and this petition for certiorari is brought under Section 240 of the

Act of February 13, 1925, F. C. A., Tit. 28, Sec. 347 (a) and Sec. 463 (c), which directly makes Sec. 347 applicable to habeas corpus cases in the Circuit Court of Appeals.

(C) STATEMENT OF THE CASE REQUIRED BY RULE 27(d).

This has already been stated in the preceding petition, pages 1-6, which statement is hereby adopted and made a part of this brief (4 Fed. Proc. Forms, p. 529).

(D) SPECIFICATION OF ERRORS.

1(a). The Circuit Court of Appeals erred in holding that it was a part of the marshal's official duty to call the jury together at their hotel quarters in the absence of the defendants and without defendants' knowledge, and to tell the jury that the case was one of unusual importance—to tell them that the government had spent large sums of money—thousands of dollars—in preparation for the trial and to tell them he didn't want "no mistrial" of the case, and in holding that such communications were not prejudicial to the defendants, and did not infringe his constitutional right to a fair trial.

1(b). The Court erred in holding that the acts of the United States deputy marshals in mixing and mingling freely with the jury at their quarters during their segregation, eating meals and making merry with them, drinking intoxicating liquors with them, visiting and playing poker (penny ante) with them two entire evenings, were fair to the defendants on the trial by that jury and that such acts and the extensive use of intoxicating liquor by the jury did not constitute prejudicial misconduct, nor infringe petitioner's constitutional right to a fair trial.

1(c). The Circuit Court of Appeals erred in holding that the burden was on Petitioner to show that the admitted misconduct of the deputy marshals influenced the

jury in favor of the government and against the plaintiff, and in failing to hold that the burden of proof was on the government to show that the jury had **not** been influenced in favor of the government and against the petitioner by the conduct in question.

2. The Court erred in holding that an employe of the United States, employed in the very department with which the alleged crime for which Petitioner was on trial was connected, was competent to serve as a juror in said cause, and that Petitioner's constitutional rights to trial by an impartial jury were not impaired thereby.

3. The Court erred in holding (a) that the erroneous refusal of the trial court to admit competent evidence vital to the defense of Petitioner on trial, was a mere error and could be reviewed only upon appeal; (b) in holding that the rejection of competent evidence vital to his defense did not constitute such an infringement of his constitutional rights as to vitiate a sentence resulting from such trial; (c) in holding that habeas corpus would not lie to redress such refusal, especially where, on appeal, the Circuit Court of Appeals overlooked the fact that such evidence had been offered by Appellant to prove good faith only, a purpose for which it was clearly competent, and failed to correct the error.

(E) SUMMARY OF ARGUMENT.

This case involves infringement of three fundamental constitutional rights, viz.:

1. The right to a fair trial free from improper meddling or tampering with the jury; or the use of intoxicants;

2. The right to trial by an impartial jury;

3. The right to a full hearing.

I. (a) Communications by the United States Marshal to the jury in the absence of defendant. Not even the judge has a right to communicate with the jury regarding the case outside of the courtroom and in the absence of the defendant.

If it would violate fundamental rights for the judge to do so, certainly it would equally violate such rights for the United States Marshal to do so. Furthermore, the marshal had no official duty to communicate with the jury regarding the case. He called the jury together at their quarters at the hotel in the absence of the court and of the defendant and told the jury the case was of unusual importance; he told them the government had spent large sums of money—thousands of dollars—in preparation for the trial and he told them he didn't want a mistrial of the case.

(b) The deputy marshals, including two charming lady deputies, had no more right to mix and mingle with the jury, than if strangers. In fact, as employes of one of the parties, it was more important that they should remain aloof from the jury than that strangers should do so. Their conduct in mingling freely with the jury, delivering mail to individual jurors at their individual rooms and socially visiting and drinking with them there, their conduct in eating meals and making merry with the jurors, conversing constantly with them during and after mealtime, in visiting, drinking intoxicating liquors and playing poker with the jurors during at least two entire

evenings, making themselves a social adjunct of the prosecution, the conduct of one of the deputies in taking a juror on an hour and a half trip to the juror's farm with no one else present and without the knowledge of the bailiff in charge, the conduct of the bailiffs and deputies in furnishing and allowing the jurors to obtain privately from bellboys and porters large quantities of intoxicating liquor (over eleven quarts of whisky) for use as a beverage during the trial, and their conduct in taking the jurors to stores, barbershops and hotels where they had an opportunity to talk with clerks, barbers, and others, and in taking them to a moving picture theater, to a basketball game, to church, to a zoological garden and to an army camp—was so well calculated to build up a friendly attitude toward the government which would necessarily impair the jurors' fairness to the defendant, that it constituted a violation of defendant's fundamental rights to a fair trial.

The marshal and deputies had no more right than a sheriff or his deputies to mix and mingle and talk with the jurors.

Where opportunities to influence the jury are shown to have existed, the burden of proof is cast upon the government to show that no prejudicial influence against the defendants was exerted. The most that can be claimed for the testimony of the government is that it showed that the case was not discussed between the jurors and the deputies, but there is **no denial of the communications of the marshal** to the jury; no showing that the jury was not influenced by the acts and conduct of the deputies, nor that there was not an unconscious influence exerted by the friendly social relations as stated.

It is inconceivable that defendants would not suspect that the jury was influenced by such conduct or that they would not develop an intense distrust of the courts where such conduct is permitted and sanctioned. Such conduct and the free use of intoxicants **would be**

certain to develop suspicion on the part of defendants and would afford ample ground for a corresponding suspicion and distrust on the part of the public at large were such conduct to become known. If the courts are sincere in saying that their proceedings **must be above suspicion,** it would seem that you must promptly and effectively rebuke such conduct.

II. An employe of one of the parties will be presumed to have **an inclination** to favor that party, particularly where his employment is in the very department concerned by the case on trial.

The charge was use of the mails to effectuate a fraud. Juror Goggins was an Assistant Postmaster, employed in the very department of the government with which the alleged crime was concerned. His position would naturally cause a bias against misuse of the mails. His position would naturally give him an influence over the other jurors which might easily act to the prejudice of defendant.

On *voir dire,* on examination by the court and cross-examination by the defendant, he stated that his business was that of storekeeper and farmer, and withheld the fact that he was an Assistant Postmaster, which fact did not come to the knowledge of defendants until a year or more after the trial. He was not an impartial juror. Defendants' constitutional right to trial by an impartial jury was infringed by his employment on such jury.

This Court in the Wood case[3] expressly pointed out that the decision in the Crawford case[4] might be correct as to a postal clerk employed in the very department concerned with the alleged crime, and reserved the point for future decision when an appropriate case should arise. This is an appropriate case and the question should now be settled by you.

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[3]*U. S.* v. *Wood,* 299 U. S. 123.

[4]*Crawford* v. *U. S.,* 212 U. S. 183.

III. The Constitution assures a defendant in a criminal case a full hearing, which includes the right to introduce competent evidence to establish every element of his defense.

On a trial for fraudulent use of the mails, good faith on the part of the defendants is a good defense. Defendant offered and sought to introduce competent evidence to establish his defense of good faith. This evidence was ruled out by the trial court and defendant was not permitted to introduce it, although it had been offered expressly for the limited purpose of showing good faith.

On appeal the Eighth Circuit Court of Appeals held that the evidence was not admissible generally. It implied that it would have been admissible for the limited purpose of showing good faith. It entirely overlooked that portion of the record showing that the evidence in question had been offered **specifically for that very limited purpose of showing good faith.** This was shown conclusively on the hearing in the habeas corpus case in the District Court, but both the District Court and the Circuit Court of Appeals held that the ruling rejecting the evidence in question had been a mere error of the trial court which could be reviewed **only upon appeal** and that such ruling did not vitiate the sentence nor afford ground for relief by habeas corpus.

The rejection of competent evidence to show a vital element of the defense is a violation and infringement of the constitutional right to a full hearing and under well settled rules such a violation justifies relief by habeas corpus. There is a great conflict in the rulings of the various federal courts on this subject as well as upon Points I and II above, and the questions raised by Petitioner should be settled by this Court.

ARGUMENT.

The questions involved in this case are set out in the petition on pages 6 to 9 and for the sake of brevity are not repeated here. The essence of the questions is whether the rule that the violation of fundamental constitutional rights vitiates a verdict and sentence thereby obtained, applies to the right (a) to a fair trial free from improper meddling with the jury and from the use of intoxicants by jurors; (b) to trial by an impartial jury; and (c) to a full hearing.

That obedience by trial courts to constitutional requirements is a prerequisite to the validity of their judgments is now well settled.[6]

The reasons relied on for the allowance of the writ involve the conflict in the decisions and the need of settling the law with reference to constitutional rights as applied to the competency of an assistant postmaster to act as a juror on the trial of a charge of fraudulent use of the mails, and to denial of a full hearing by rejecting competent evidence which defendant offered and sought to introduce to prove a vital element of his defense.

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[5]*Furness W. & Co.* v. *Yang Tsze Ins. Asso.*, 242 U. S. 430, 61 L. Ed. 409-414.

[6]*In re Neilsen*, 131 U. S. 176, 33 L. Ed. 118, 9 S. Ct. 672; *Hudspeth* v. *McDonald*, 120 F. 2d 962; *Lisenba* v. *People of the State of California*, (Dec. 8, 1941) 86 L. Ed. Adv. Op., p. 179; *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Moore* v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406; *Chambers* v. *Florida*, 309 U. S. 227, 241, 84 L. Ed. 716, 724, 60 S. Ct. 472; *Glasser* v. *U. S.*, 86 L. Ed. Adv. Op., p. 405 (Jan. 19, 1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, 58 S. C. 1019; *Walker* v. *Johnston*, 312 U. S. 275, 85 L. Ed. 830-836, 61 S. Ct. 574; *Smith* v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859; *Herndon* v. *Lowry*, 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732; *Bob White* v. *Texas*, 310 U. S. 530-533, 84 L. Ed. 1343, 60 S. Ct. 1032; *Smith* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84; *Edwards* v. *U. S.*, 312 U. S. 473, 85 L. Ed. 957, 61 S. Ct. 669 (Mar. 3, 1941).

I.

WRONGFUL MEDDLING WITH THE JURY.

The decision of the Circuit Court of Appeals holds that the conduct of the marshal in giving orders and communications to the jury in the absence of defendant, the conduct of the deputy marshals in eating, drinking and making merry with the jurors, in permitting them to obtain intoxicating liquors and in accompanying individual jurors on various trips away from the others, either constituted a part of the official duty of the marshal and his deputies, or was not unfair and prejudicial to Petitioner.

This decision was probably in conflict with applicable decisions of this Court and other Circuit Courts of Appeal, and so far departs from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision for the following reasons:

The clear weight of authority is that there was no right or duty upon the part of the marshal to give the jury **any** orders regarding their conduct while on the jury, nor any communications about the case. That was a matter for the judge alone.

In *Quercia* v. *U. S.*, 289 U. S. 466, 77 L. Ed. 1321, it is said:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is **the governor of the trial for the purpose of assuring its proper conduct.** * * * Under the Federal Constitution **the essential prerogatives of the trial judge,** as they were secured by the rules of common law, are maintained in the Federal courts."

Therefore the judge and not the marshal was the one to give instructions.

Furthermore, even the judge had no right to go to the jurors' quarters privately, as the marshal did, and communicate with them as to their conduct or as to the case.

Suppose Judge Trimble, instead of Marshal Pettie, had gone to the jurors' quarters at the hotel after adjournment, and called the jury together in the absence of defendants and their counsel, and had said to the jury, as Marshal Pettie did (Rec. 402), "Gentlemen, you must not discuss this case with each other or anyone else. This is a very important case (Rec. 161). The government has spent a lot of money—thousands of dollars (Rec. 173)—in preparation for this trial (Rec. 190) and I don't want any mistrial" (Rec. 224). Under the prevailing authorities such action on his part would have been error prejudicial to defendants and a violation of their rights to a trial in open court.

In *Parfet* v. *Kansas City Life Ins. Co.*, 128 F. 2d 361, decided only one day before this case was argued, the jury handed the bailiff a written question for the court. The court returned a verbal answer "No" by the bailiff and the Circuit Court of Appeals said:

> "* * * It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

In *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, it is said:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict."

and it was held the trial court had no right to give a supplementary instruction to the jury in the absence of the parties.

In the Fillippon case the court cited with approval several United States cases to the same effect and also many decisions of the state courts collated in the note to *State* v. *Murphy,* 17 L. R. A. (N. S.) 609.

In the Murphy case the judge was informed that the jury desired to communicate with him, went to the door of the juryroom and when the door was opened, stood in the open space and said, "Good evening, gentlemen, I understand you want to see me. Have you agreed?" to which the foreman of the jury replied: "No; I think we cannot agree." Whereupon the judge, after pausing a second, replied. "I will ask you to consider the matter further. Good night."

The North Dakota Supreme Court, after saying that there was no question about the uprightness of the judge's intentions, said:

> "All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. * * * * * * It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. **The authorities are practically unanimous in condemning such communications,** and in holding them prejudicial as a matter of law."

Quoting from *State* v. *Wroth,* 15 Wash. 621, 47 Pac. 106, the court said:

> "In the discharge of his official duty, the place for the judge is on the bench. * * * The appellant was not obliged to follow the judge to the jury room

in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge;"

In the note referred to, other cases were cited holding it to be error for the judge to answer a question sent by the jury "without regard to the nature of the communication"; to be "improper though the answer given was correct"; where the judge stepped to the door of the jury room and being asked a question "told the jury he could not answer it but that the point was covered by his charge"; also where the judge went to the jury room and announced that the sheriff would take the jury to supper and "cautioned them as to their conduct while at the meal."

Obviously if **not even a judge** had a right to so communicate with the jury, the United States Marshal had no right to do so.

The conflict in the cases in the note to the *Murphy case,* 17 L. R. A. (N. S.) 609, clearly demonstrates that there is a conflict which should be settled by this Court.

NO STATUTORY DUTY.

No support for the action of the marshal in communicating with the jury as he did, and no support for the actions of the marshal's deputies in eating meals, merrymaking, drinking liquors and playing poker with the jurors can be inferred from the statutes either of the United States or of Arkansas.[7]

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[7]U. S. Code, Tit. 28, Sec. 490, provides: "A marshal shall be appointed in each district," and Section 494 requires every marshal and deputy marshal to take a prescribed oath; Section 503 makes it the duty of the marshal of each district to attend the district courts and to execute all lawful precepts; Section 504 gives the marshals the same powers as sheriffs and their deputies.

The Arkansas laws provide (Pope's Digest of 1937, Sec. 2709): "The sheriffs of the several counties shall be the sheriffs of the several courts" and (Sec. 11822) "shall attend each regular and special term of the county court"; and (Sec. 11823) "shall perform

In *Sutherland* v. *State*, 76 Ark. 487, 89 S. W. 462, it is held that:

> "Where the officer in charge leaves the jury in charge of another **officer not specifically sworn** the purity of the trial is thereby impeached.
>
> "The purity of the trial is impeached *prima facie* by showing that the jury was subjected to such influences, and the burden was at least cast upon the state to show that no prejudice in fact resulted."

MARSHALS ARE NOT BAILIFFS.

The United States statutes recognize a clear distinction between a marshal or deputy marshal and bailiffs sworn to take charge of a jury under U. S. Code, Tit. 28, Sec. 9, and Secs. 595, 596 and 527.

MISCONDUCT OF DEPUTY MARSHALS AND JURORS.

The acts and conduct of the deputy marshals are shown in the statement of the case (Petition pp. 1-6), visiting and drinking with the jurors at their quarters at the hotel, drinking highballs and eating meals and making merry with them at the hotel, entertaining and playing poker with them on two entire evenings at their hotel quarters, the action of deputies and bailiffs in providing or permitting the jurors to obtain large quantites of intoxicating liquor and the action of the jurors in using it, allowing the jurors to communicate with bellboys and porters to obtain such liquors, Deputy Marshal McBurnett taking Juror Shamel by automobile to Shamel's farm involving an hour and a half trip with no one else present,

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all other acts and things required of him by law"; (Sec. 11817) "Each sheriff shall be a conservator of the peace in his county."

The Arkansas laws give the sheriff no authority to instruct, take charge of, or associate with, a segregated jury, and Pope's Digest, Sec. 4024, provides for admonition **by the court**, not by the sheriff.

and the other trips and incidents set out in the statement of facts (Petition pp. 1 to 6). Did these things afford opportunities for improperly influencing the jurors or any of them—did these things have a tendency to influence the minds of the jurors, inclining them either consciously or unconsciously to favor the government?

We do not believe another case can be found where so many instances of improper conduct and such a continuous course of misconduct has occurred, but there is a well established general rule which condemns such acts.

THE GENERAL RULE.

The general rule of law is well established both by the federal and state cases that third persons have no right to mix and mingle with the jury and that any communications from them to the jury regarding the case or any opportunity for such communications will be held to vitiate the verdict and render the trial unfair as to the defeated party, with the possible exception of cases where it is shown affirmatively that the communication had no effect upon the verdict.

This rule is illustrated strongly in *Stone* v. *U. S.*, 113 F. 2d 70, where it was shown that a third person approached one of the jurors and asked him a question. It was not shown that such person was connected with either the government or with the defendant. He may have been entirely disinterested. It was not shown that the question did in fact influence the jury.

The Circuit Court of Appeals quoted from the decision in the Stone case as follows:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury."

but it failed to note from the Stone case the following:

> "* * * the object of a jury trial would be subverted if they were allowed to communicate with

other persons, or other persons to communicate with them, unless for some purpose of necessity and in the presence of the court.

"* * * * Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained.

"The improper communication with the juror in the present case **raises the presumption** that the rights of appellants were prejudiced and there is no showing on the part of appellee that no injury could have occurred by reason of the irregularity."

The Stone case follows the decision in *Mattox* v. *U. S.*, 146 U. S. 140-151, 13 S. Ct. 50, 36 L. Ed. 917, where the court said that no ground of suspicion that the administration of justice has been interfered with, will be tolerated. In the Mattox case it is said:

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden and invalidate the verdict, at least unless their harmlessness is made to appear."

Many state cases could be cited to the same effect.[8]

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[8]*State* v. *Neville*, 227 Iowa 329, 288 N. W. 83, where one of the lady jurors, simply for convenience, was allowed to ride home with the prosecuting attorney near whom she lived. The evidence showed specifically that there was no mention of the case during any of these rides, but the court said:

"Manifestly, this is not a case of intentional misconduct. It has to do with **unconscious** influence upon jurors as a result of favors from and **social intercourse** with parties, counsel and others connected with litigation. It has to do * * * with public policy and with the effect of such irregularities upon the minds of litigants and the public at large. *Lynch* v. *Kleindolph*, 204 Iowa 762, 764, 216 N. W. 2, 3."

In the Lynch case the court said:

"The question before us is not a question of whether any actual wrong resulted from the association of this defendant with the juror, under the circumstances related, but whether

SHERIFFS AND MARSHALS NOT EXEMPT FROM THIS RULE.

Many cases hold this rule applies to sheriffs and similar officers. In *State* v. *Smith*, 56 S. D. 238, 228 N. W. 240, a conviction was reversed because the sheriff who was not a bailiff in charge went with one of the jurors to put his car in the garage and talked to him for several minutes while on the way to a restaurant for supper, and it was held prejudice would be presumed and the burden was on the state to show that defendant was not prejudiced.

To the same effect is *State* v. *Osler*, 228 N. W. 251.

In *Knight* v. *Inhabitants of Freeport*, 13 Mass. 218, a new trial was granted for such conduct, and the court said:

> "We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes; and every one ought to know, that, for any, even the least, intermeddling with jurors, a verdict will always be set aside."

Similar holdings were made in *Shefelker* v. *First Nat. Bank of Marion*, 212 Wis. 659, 250 N. W. 870-872; *Lavalley*

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it created a condition from which **the opposing litigants and the general public might suspect** that wrong resulted from this association. * * *" (p. 332).

In *Comm.* v. *Fisher*, 226 Pa. 189, 75 Atl. 204, 26 L. R. A. (N. S.) 1009, and in *Comm.* v. *Roby*, 12 Pick. 496, it is said:

> "where the jury * * * have had communications not authorized, there, inasmuch as there can be **no certainty that the verdict has not** been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly, and may have been corruptly, done, * * *"

Also:

> "they must be kept entirely aloof and free from contact or communication with other parties than **the bailiffs** who have them in keeping during the trial. * * *"

v. *State*, 188 Wis. 68, 205 N. W. 412, and *Village of Bangor* v. *Hussa C. & P. Co.*, 208 Wis. 191, 242 N. W. 565.

In the Shefelker case the court held that the granting of a new trial under such circumstances was compulsory upon the trial court, and said:

> "the underlying fact back of the ruling in both cases was that **opportunity was presented** for the persons representing the party to exercise an influence, although done **silently or without mention of the case,** upon the action of the juror."

and held that the very fact that a witness who extended the courtesy of a ride to a juror, warned him not to discuss the case, would be calculated to create in his mind a favorable impression of the character of the witness.

In the Lavalley case, during the trial, a juror asked the sheriff if he could ride with him to a dance some ten or twelve miles away. The juror rode in the back seat. The case was not mentioned between them. There was no effort to influence the juror. The court said:

> "It is not in the power of affidavits to show that the two jurors were **not consciously or unconsciously affected by it.** * * * The state is necessarily represented upon the trial of such cases by its officers. * * * the sheriff is charged by statute with the duty of enforcing the law throughout his county. * * * In *Hutchins* v. *State*, 140 Ind. 78, 39 N. E. 243, * * * the deputy prosecuting attorney, * * * spoke to a juror and volunteered to take a message to the latter's family. The court said:
>
> > '* * * Granting that no wrong was intended by either prosecutor or juror, yet the offense committed by both against a fair and impartial trial of the man accused of crime was most reprehensible.'
>
> "* * * The **natural effect** of such conduct is to excite suspicion and to arouse **the gravest apprehensions** on the part of one so on trial, and certainly

> does not inspire confidence in the administration of justice. * * *"

In *State* v. *Ferguson*, 48 S. D. 346, 204 N. W. 652-660, it is said:

> "* * * So delicate are the balances in weighing justice that what might seem trivial under some circumstances would turn the scales to its perversion. Not only the evil, in such cases, but the appearance of evil, if possible, should be avoided."

If cases can be found to the contrary, it only shows a conflict which should be settled by this Court. The decision of the Circuit Court of Appeals is plainly contrary to the Stone and Mattox cases, and to the general rules of law set out in the various state cases cited, and this Court should correct the error of the lower court.

The plain, unescapable fact is that the marshal did give unauthorized communications to the jury. Whether you call them instructions is immaterial. He told them "This is an unusually important case (Petition, Div. I, p. 5, and Rec. 166, l. 7). He told them the government had spent a lot of money—thousands of dollars—in preparing for trial (Rec. 173, ll. 24 to 30). He told them he didn't want a mistrial (Rec. 224, ll. 5 to 10). The equally inescapable fact is that the two charming young ladies and other deputy marshals had **abundant opportunity** to influence the jurors, consciously or unconsciously.

The fact is plain that this conduct mentioned would **certainly create the suspicion** in the minds of defendants and of the public at large that the jury was influenced thereby. It is wholly immaterial whether such influence was conscious or unconscious, whether it was designed as an aid to the prosecution.

It is high time for this Court to put a stop to such practices—to see that the lower courts not only give lip service to the Constitution, but that with heart and soul they make it effective.

This is not a case where the evidence upon the trial of the indictment was all one way. Forty-six witnesses took the stand and testified under oath that they had been treated and cured of the various ailments referred to in the indictment and hundreds more would have done so if the court had not limited the number of witnesses which he would allow defendants to introduce upon that point.

The case was conducted with such bitterness by the prosecuting attorneys that the Eighth Circuit Court of Appeals, in rendering its opinion said: "This outrageous conduct on the part of the government attorney was unethical, highly reprehensible, and merits unqualified condemnation" (115 F. 2d 533-543). In such a case it is obvious that the pleasant social relations carried on by the deputy marshals with the jury might easily turn the scale and constitute an improper factor in causing the minds of the jury to reach a verdict of guilty.

The opinion of the Circuit Court of Appeals is glaringly inconsistent. It says (p. 5) that "the charges of misconduct, if true, would be wholly obnoxious to the fundamental rules of fairness and justice" and then after finding that the major portion of those charges were true, held that it was not shown that the jury was actually influenced thereby.

It says (p. 5) that if it is made to appear that a jury **is exposed** to any matter or thing "which might tend to prejudice or influence their consideration of the case," a "**presumption arises** against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing or behavior did not influence their verdict," citing the Mattox and other cases.[9]

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[9]*Mattox* v. *United States*, 146 U. S. 140; *Stone* v. *United States*, 113 F. 2d 70, 77; *Ray* v. *United States*, 114 F. 2d 508; *Klose* v. *United States*, 49 F. 2d 177; *Lavalley* v. *State*, 205 N. W. 412, 417; *State* v. *Smith*, 228 N. W. 240; *Clements* v. *Commonwealth*, 6 S. W. 2d 483; *Salyers* v. *Commonwealth*, 118 S. W. 2d 208. Annotations in 22 A. L. R. 254, 34 A. L. R. 103 and 62 A. L. R. 1466.

But contradicted that by saying: "It is presumed that the jury will be true to their oath and conscientiously observe the instructions and admonitions of the court."

It erroneously said further:

> "It is the duty of the United States Marshal and his deputies as sworn officers of the court to guard against any outside influences which might pervade the minds of the jurors in arriving at a just verdict, based upon the facts submitted to them by the court" (129 F. 2d 782).

and held "it was therefore not improper but commendable for the marshal to admonish the jury."

The only case cited by the court in support of that doctrine is *U. S.* v. *Ball*, 163 U. S. 662, 41 L. Ed. 300. In that case the jury had been placed in charge of a deputy marshal. The jury had been instructed by the court that they must not separate, must not talk to each other and must not allow themselves to be talked to by any party on the outside about the case. The court said:

> "It would have been according to the more usual and regular practice, to administer a special oath to the officer put in charge of a jury."

but said no objection was made to his taking charge of the jury and the jury were properly cautioned by the court.

The decision of this Court in the Sinclair case[10] indicates clearly how this Court will probably view the acts and conduct of the deputies set out in the petition, pages 1 to 6.

Suppose Sinclair, instead of merely employing detectives to watch the jury secretly and without their knowledge, had employed those detectives to do the things which the deputy marshals did in this case—to visit with the

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[10]*Sinclair* v. *U. S.*, 279 U. S. 749, 73 L. Ed. 946, 49 S. Ct. 471.

jury at their hotel quarters, to drink highballs, to eat meals and make merry with them, to play poker and entertain them two entire evenings—would you have said it is not shown that these things did actually influence the jury and therefore it wasn't contempt of court for him to do that? If this Court condemned Sinclair for doing things which never got to the knowledge of the jury at all, how much more would it have condemned him if he had caused his employes to do the things which the government employes did do in this case.

Surely the defendant in a criminal case in United States courts is as much entitled to a fair trial as the government is, and he needs a fair trial as much or more than the government does.

II.

IS AN EMPLOYE OF THE UNITED STATES, TO-WIT, AN ASSISTANT POSTMASTER, AN IMPARTIAL JUROR WITHIN THE MEANING OF THE CONSTITUTION, UPON TRIAL OF A DEFENDANT CHARGED WITH FRAUDULENT USE OF THE MAILS, SUCH OFFENSE BEING CONCERNED WITH THE VERY DEPARTMENT IN WHICH HE IS EMPLOYED?

The Circuit Court of Appeals (179 F. 2d, p. 783) held that a government employe employed in the very department concerned with the alleged crime, to-wit, Assistant United States Postmaster, was not incompetent to serve as a juror upon the trial of defendants charged with fraudulent use of the mails, thus deciding an important question of federal law which has not been settled by this Court, but was expressly reserved by it in *U. S.* v. *Wood*, 299 U. S. 123, 81 L. Ed. 78, and the decision so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The findings and the evidence show without dispute that W. L. Goggins, one of the jurors upon the trial of *U. S.* v. *Baker et al.*, was an Assistant Postmaster of the United States; that upon examination by the judge on *voir dire* in January, 1940, he testified that his occupation was that of farmer and storekeeper; that upon cross-examination by counsel for defendants, when asked what his business was, he stated that he was a farmer and storekeeper but withheld his employment as assistant postmaster; that upon taking his deposition on behalf of respondent herein in June, 1941, upon cross-examination by counsel for Petitioner, he disclosed for the first time that he was and had been at the time of the trial, Assistant Postmaster of the United States at Herbine, Arkansas, the postoffice being located in the store which he and his brother carried on, and his brother being Postmaster (Rec. 387).

Thus neither Petitioner nor his counsel had any knowledge that said juror was an employe of the United States until long after the time for filing motion for new trial had expired and Petitioner's only relief was by habeas corpus (Rec. 245).

It is Petitioner's contention that in view of said Goggins being employed in the Postoffice Department, the department concerned with the alleged crime, he cannot be considered impartial as between the parties, and that the decision in *U. S.* v. *Wood*, 299 U. S. 123, 81 L. Ed. 78, while holding that the law permitting employes of the government to sit as jurors in the District of Columbia, if otherwise qualified, did not violate the constitutional provision as to trial by an impartial jury, expressly pointed out that the decision in *Crawford* v. *U. S.*, 212 U. S. 183, 53 L. Ed. 485, might be upheld on the ground that the juror was employed in the Postoffice Department, being a clerk in charge of a subpostal station in his drugstore, and the crime charged was an alleged conspiracy to defraud the government in connection with a contract for furnishing satchels to the Postoffice Department.

In the Wood case the court was divided. The majority opinion said:

> "It will be observed that the employment was in **the very department** to the affairs of which the alleged conspiracy related. But the decision took a broader range and did not rest upon that possible distinction."

This point was not decided in the Wood case. Obviously it is of such importance that this Court should now settle it.

What does "impartial" mean? Webster says it means "Not partial: specifically, not favoring one more than another; treated all alike; unbiased." He defines "partial" as meaning **"Inclined** to favor one party in a cause, or one side of a question, more than the other; biased; predisposed; as, a judge should not be partial."

In the Crawford case the court said what is obviously true, that

> "A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, **to any doubt** on that subject" (212 U. S. 195).

As Assistant Postmaster, Mr. Goggins must have been familiar with the United States Postal Guide and order of the Postmaster General as to use of the mails. He must have been familiar with the duties of the postmasters to be on guard against any fraudulent use of the mails. He must have come in contact at times with the Postoffice Inspectors who investigated such subjects. He must have felt a sort of proprietary interest in the Postoffice Department and that a certain responsibility

rested upon him to maintain its purity. Furthermore, the other jurors, knowing Mr. Goggins' position as Assistant Postmaster, would naturally give some weight to his views and opinions of the case on account of his official position.

Was he to be considered impartial? Would defendants or the public so consider him? A somewhat vivid light can be thrown upon that question by asking yourselves what any competent attorney for defendant in a mail fraud case would do with reference to allowing a postmaster or an assistant postmaster to sit as a juror, knowing him to be such. We cannot conceive and do not believe Your Honors can conceive that any capable attorney would allow such a juror to go unchallenged, if he knew the facts.

On the other hand, assuming that you were a United States Attorney prosecuting a mail fraud case, and determined to get a conviction, would you not be very glad to have an assistant postmaster or a postal clerk occupy a seat on the jury during that trial?

A further illustration can be gained by reference to other kinds of employment. Suppose an automobile driver were suing a railroad company for damages on account of a collision at a railroad crossing. Would he for a minute allow one employed as an engineer by that railroad, or as a brakeman or as a conductor, to sit as a juror in his case?

Or suppose plaintiff were suing an insurance company upon one of its policies. Would his attorney knowingly permit one of the agents of that company engaged in writing insurance for it, to occupy a place upon the jury? These are but illustrations, but they bring out clearly the principle of the Crawford case and they come within the point reserved in the Wood case. We now ask you to decide that point.

No help can come to Respondent from the statutes of Arkansas. Its Constitution plainly assures the defendant in a criminal case of trial by an impartial jury (Const.,

Art. II, Sec. 10). It needed no statutes to declare that an employe should not be considered incompetent to sit as a juror.

Its laws do provide that certain persons should have the privilege of exemption from jury service. Pope's Digest, Sec. 8344, provides that challenges for cause, should be decided by the court; Section 8341 does not provide what would or would not be cause generally, although the statute does make specific provision as to relatives within the fourth degree (Sec. 8292) and as to witnesses or persons who have formed or expressed an opinion (Sec. 8293). It also provides that "it shall be a ground of peremptory challenge that said juryman is a postmaster."

This was not a privilege granted to the juror. It was a definite, peremptory ground for challenge.

Section 8301, providing that no verdict "shall be voidable because any of the jurymen fail to possess any of the qualifications required in this chapter, nor shall exceptions be taken to any juryman for that cause after he is taken upon the jury and sworn as a juryman," as construed by the Supreme Court is not applicable to cases where, without lack of diligence on defendant's part, knowledge of the juror's disqualification did not come to him until after the trial.

The leading case so holding is *Meyer* v. *State,* 19 Ark. 156, and it is followed by *Lane* v. *State,* 168 Ark. 528, 270 S. W. 974; *Corley* v. *State,* 162 Ark. 178, 257 S. W. 750, and many other cases.

III.

THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL INCLUDES DEFENDANT'S RIGHT TO A FULL HEARING, AND TO INTRODUCE COMPETENT EVIDENCE AS TO EVERY ESSENTIAL ELEMENT OF AN ALLEGED CRIME.

The Tenth Circuit Court of Appeals (129 F. 2d 783) held that the refusal to defendants of a full hearing in a

criminal case and the denial of their right to introduce competent evidence essential to their defense was **not** such a denial of constitutional rights as would entitle defendants to raise the question upon habeas corpus, but that the question was **reviewable solely upon appeal;** also necessarily holding that the fact that upon appeal the Eighth Circuit Court of Appeals overlooked the fact that the evidence in question had been offered and sought to be introduced for a purpose for which it was clearly competent, did not change the rule.

This holding constituted a decision of an important federal question as to which there is much conflict and which has not been but should be settled by this Court.

The refusal to permit the introduction of competent evidence vital to the defense, is a violation and infringement of defendant's constitutional rights to a fair trial.

As said by Daniel Webster and upheld by this Court in the Dartmouth College Case, due process of law means "a law which hears before it condemns."

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." 12 Amer. Jur. 303.

This was quoted from the opinion of Justice Brandeis in *Akron C. & Y. R. Co.* v. *U. S.,* 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605-614.

In *B. & O. R. Co.* v. *U. S.,* 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797, this Court said in so many words:

> "the due process clause assures a full hearing before the court * * * that includes the right to introduce evidence and have judicial findings based upon it" (p. 1224).

In *Crawford* v. *U. S.,* 212 U. S. 183, 53 L. Ed. 485, 29 S. Ct. 260, the lower court refused defendant the right

to introduce in evidence certain account books to corroborate his testimony that the receipt of certain moneys by him was known to the company in question and the books were not offered as ordinary account books, but "as a written corroboration" of defendant's evidence. The court held the exclusion was error and said "no material and proper evidence on that issue should have been excluded."

The right to introduce evidence as a constitutional right was upheld in *Washington ex rel. Fairchild,* 224 U. S. 510, 56 L. Ed. 863, 32 Ct. 535, and the court said:

> "The carrier must have the right to secure and present evidence material to the issue under investigation."

In *Ga. R. & E. Co.* v. *Decatur,* 295 U. S. 165, 79 L. Ed. 1365-1370, 55 S. Ct. 701, the court said that the refusal to receive proof on the subject "amounts to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution."

In a very late case on certiorari to the Tenth Circuit Court of Appeals, *Edwards* v. *U. S.,* 312 U. S. 473, 85 L. Ed. 957-963, it is said:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. * * * The parties must be given an opportunity to plead and prove their contentions. * * * The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is **forbidden.**"

In the late case of *Shepard* v. *U. S.,* 290 U. S. 96, 78 L. Ed. 197, 54 S. Ct. 22, the court reversed a decision of the Tenth Circuit Court of Appeals and held that the admission of a dying declaration against the defendant was not only erroneous but deprived the defendant of a fair trial. If it deprived him of a fair trial, it obviously infringed his constitutional rights.

One of the Supreme Court's latest pronouncements in a habeas corpus case is *Lisenba* v. *People of the State of California,* (Dec. 8, 1941) 86 L. Ed. Adv. Op., p. 179.

> "The fact that the confessions have been **conclusively adjudged** by the decision below to be admissible under state law, notwithstanding the circumstances under which they were made, **does not answer the question whether due process was lacking.**"

Many other cases to the same effect could be cited.

See, also:

Glasser v. *U. S.*, 86 L. Ed. Adv. Op., p. 405 (January 19, 1942).

Mooney v. *Holohan,* 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406.

Johnson v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. C. 1019.

Smith v. *O'Grady,* 312 U. S. 329, 85 L. Ed. 859.

The Tenth Circuit Court of Appeals did not attempt to controvert this rule, but both the lower court and the Circuit Court of Appeals refused to consider the evidence bearing upon or showing the refusal by the trial court of this right and disposed of the question by saying that the issue was one which could be reviewed upon appeal only. It held that the court would not consider whether such refusal infringed defendant's constitutional rights in such a way as to vitiate the sentence in question (129 F. 2d 779-783).

The undisputed evidence in the habeas corpus proceeding showed that defendants offered and sought to show that case histories and diagnoses indicated that several patients cured at the Baker Hospital had been afflicted with cancer before going there and that these case histories and diagnoses were communicated to the defendants and that evidence was offered by the defendants for the specific purpose of showing good faith upon their part (Rec. 25 to 38 and 452).

The Eighth Circuit Court of Appeals in its decision implies that the evidence would have been admissible for that purpose, but shows without contradiction that that court overlooked the offer of the evidence having been limited to that specific purpose (115 F. 2d, p. 538) where the court said:

> "The evidence was offered generally and not for any limited purpose. The offer of proof contained no suggestion that the witness had communicated the alleged conversation to the defendants or hospital authorities."

If defendants believed these patients had cancer and were cured at the Baker Hospital, it would support their defense of good faith which was a vital question upon the issue of whether they had formed a scheme to defraud by representing that they had a cure for cancer.

The Tenth Circuit Court of Appeals held that the refusal to permit introduction of such evidence was a mere error which could be corrected only on appeal and was not such a violation of defendant's constitutional rights as to vitiate the sentence (129 F. 2d 783).

A GREAT CONFLICT.

Upon the question of whether such a ruling is **a mere error** or whether it is an infringement of **fundamental constitutional rights** and whether the fact that a question may be or has been reviewed upon appeal bars the right to habeas corpus, there is a great conflict in the decisions of the various courts.

In *Shapiro* v. *King,* 125 F. 2d 890, it was held that the fact that certain contentions had been presented by appellant and **determined adversely** upon appeal from the conviction "does not prevent an application to test the validity of the sentence by habeas corpus," citing *Wong Doo* v. *U. S.,* 265 U. S. 239, 68 L. Ed. 999; *Salinger* v. *Loisel,* 265 U. S. 224, 68 L. Ed. 989.

There were many early decisions that a district court had jurisdiction to determine the sufficiency of an indictment and an error in that respect would be reviewable only on appeal, but this holding is contrary to the later rule where it is now established that a violation of fundamental constitutional rights vitiates a judgment based thereon, and, after appellant has exhausted every available remedy by appeal if it can be said "in the trial fundamental rights were denied him," he may resort to habeas corpus. *Hudspeth* v. *McDonald,* 120 F. 2d 962-965.

This conflict appears even in the decisions of the Tenth Circuit Court of Appeals which in the first part of its opinion in this case broadly states the modern rule as above. Likewise, in *Huntley* v. *Schilder,* 125 F. 2d 250, the Tenth Circuit Court of Appeals, while stating that the sufficiency of an indictment was originally peculiarly within the province of the trial court and his error in respect thereto could be corrected only by appeal, quoted from *Bowen* v. *Johnston,* 306 U. S. 19, 26, 83 L. Ed. 455, saying:

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

And the Tenth Circuit Court of Appeals then proceeded to consider and pass upon the sufficiency of the indictment in the Huntley case.

This distinction between mere error and violation of a fundamental constitutional right appears in *Ex parte Nielsen,* 131 U. S. 176, 33 L. Ed. 118-120, where the court said:

> "He was protected by a constitutional provision, securing to him **a fundamental right.** It was not a case of **mere error** in law, but a case of denying to a person a constitutional right, and where such a case appears on the record, the party is entitled to be discharged from imprisonment."

The conflict upon this point is clearly illustrated in *Carey* v. *Brady,* 125 F. 2d 253, where the court declined to write an opinion on the questions involved, because of the conflicting views of its members. In that case the court said:

> "One member of the court is of the opinion that a mere failure of the State Court, upon request, to appoint counsel for an indigent prisoner does not amount to a denial of due process in the absence of other circumstances showing that such appointment is necessary to a fair trial. * * * Another member of the court is of the view that such failure to appoint counsel is a denial of due process that would justify a reversal of the judgment upon appeal, but is not sufficient of itself to destroy the jurisdiction of the court and authorize the release of the prisoner, after sentence, on habeas corpus. The third member of the court is of the opinion that such a failure is of itself a denial of due process that destroys the jurisdiction of the court and entitles the prisoner to release on habeas corpus. Widespread confusion seems also to exist in the minds of judges and lawyers throughout the country with regard to these questions. * * *"

If such confusion exists among three judges of the same circuit court of appeals and if widespread confusion seems to exist in the minds of judges and lawyers throughout the country with regard to these questions, it would certainly be appropriate for the Supreme Court to examine them and settle them.

It is significant that the cases cited by the Tenth Circuit Court of Appeals, when carefully analyzed, do not sustain the rule announced by that court in the case at bar.

The Matter of Moran, 203 U. S. 96-105, is in effect overruled by later cases and is contrary to them.

In *McMicking* v. *Shields,* 238 U. S. 99, there was no allegation that defendant desired to offer additional evidence.

Moore v. *Alderhold,* 108 F. 2d 729, is not in point. There is no holding that the denial of a constitutional right to a full hearing is reviewable only on appeal.

Garrison v. *Hudspeth,* 108 F. 2d 733, is not in point on the question of the denial of a full hearing by rejecting competent evidence. The same is true of *Clarke* v. *Huff,* 119 F. 2d 204.

In *Curtis* v. *Rives,* 123 F. 2d 936, the point was neither proven nor argued.

CONCLUSION.

In conclusion we strenuously and devoutly urge that this Court should determine and settle:

1. Whether the violation or infringement of defendant's consitutional rights during the trial of a criminal case in the United States courts vitiates or invalidates a sentence resulting from such trial;

1(a). Whether defendant's constitutional rights to a fair trial were infringed and violated by unauthorized communications about the case by the United States Marshal to the jury; whether they were infringed by the acts of deputy marshals in visiting, eating, drinking, merry-making and playing poker with the jury and the use of intoxicating liquors, accompanying one or more of the jurors on various trips, and the other acts and conduct set out in the statement of the case on pages 1 to 6 of the petition;

2. Whether defendant's right to an impartial jury was infringed by the inclusion on the jury of an employe of the United States, employed in the very department concerned with the alleged crime for which defendant is on trial;

3. Whether defendant's constitutional rights to a full hearing in a criminal case were violated by the denial

of his right to prove his good faith by introducing evidence which was competent for the purpose of showing good faith, where good faith was an essential element of his defense;

3(a). Whether such a violation is obviated or cured by raising the question upon appeal to the Circuit Court of Appeals, where that court, by oversight as to the undisputed record, holds that the evidence was offered generally and was not offered specifically for the limited purpose for which it was clearly competent.

Respectfully submitted,

A. G. BUSH,
Counsel for Petitioner.